COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

To: **Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure**

From: **Honorable Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure**

Date: **December 17, 2004**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met in Santa Fe, New Mexico, on October 28 and 29, 2004.

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Part I of this report presents action items. Part I A recommends transmission for approval of new Civil Rule 5.1 and conforming amendments to Civil Rule 24(c). These proposals were published for comment in August 2003. They were discussed and revised at the April and October 2004 meetings. The Committee believes that the revisions do not require republication.

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I Action Items

A. Rules for Adoption: New Civil Rule 5.1 — Notice of Constitutional Question; Conforming Rule 24 Changes

The Advisory Committee recommends approval for adoption of new Civil Rule 5.1, and a conforming amendment of Civil Rule 24(c), as follow on the next pages:

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 5.1. Constitutional Challenge to a Statute — Notice, Certification, and Intervention

(a) Notice by a Party. A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly:

(1) file a notice of constitutional question stating the question and identifying the paper that raises it, if:

(A) a federal statute is questioned and neither the United States nor any of its agencies, officers, or employees is a party in an official capacity, or

(B) a state statute is questioned and neither the state nor any of its agencies, officers, or employees is a party in an official capacity; and

(2) serve the notice and paper on the Attorney General of the United States if a federal statute is challenged — or on the state attorney general if a state statute is challenged — either by certified or registered mail or by sending it to an

*New material is underlined; matter to be omitted is lined through.

electronic address designated by the attorney general for this purpose.

(b) Certification by the Court. The court must, under 28 U.S.C. § 2403, certify to the Attorney General of the United States that there is a constitutional challenge to a federal statute, or certify to the state attorney general that there is a constitutional challenge to a state statute.

(c) Intervention; Final Decision on the Merits. Unless the court sets a later time, the attorney general may intervene within 60 days after the notice of constitutional question is filed or after the court certifies the challenge, whichever is earlier. Before the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.

(d) No Forfeiture. A party's failure to file and serve the notice, or the court's failure to certify, does not forfeit a constitutional claim or defense that is otherwise timely asserted.

Committee Note

Rule 5.1 implements 28 U.S.C. § 2403, replacing the final three sentences of Rule 24(c). New Rule 5.1 requires a party that files a

pleading, written motion, or other paper drawing in question the constitutionality of a federal or state statute to file a notice of constitutional question and serve it on the United States Attorney General or state attorney general. The party must promptly file and serve the notice of constitutional question. This notice requirement supplements the court's duty to certify a constitutional challenge to the United States Attorney General or state attorney general. The notice of constitutional question will ensure that the attorney general is notified of constitutional challenges and has an opportunity to exercise the statutory right to intervene at the earliest possible point in the litigation. The court's certification obligation remains, and is the only notice when the constitutionality of a federal or state statute is drawn in question by means other than a party's pleading, written motion, or other paper.

Moving the notice and certification provisions from Rule 24(c) to a new rule is designed to attract the parties' attention to these provisions by locating them in the vicinity of the rules that require notice by service and pleading.

Rule 5.1 goes beyond the requirements of § 2403 and the former Rule 24(c) provisions by requiring notice and certification of a constitutional challenge to any federal or state statute, not only those "affecting the public interest." It is better to assure, through notice, that the attorney general is able to determine whether to seek intervention on the ground that the act or statute affects a public interest. Rule 5.1 refers to a "federal statute," rather than the § 2403 reference to an "Act of Congress," to maintain consistency in the Civil Rules vocabulary. In Rule 5.1 "statute" means any congressional enactment that would qualify as an "Act of Congress."

Unless the court sets a later time, the 60-day period for intervention runs from the time a party files a notice of constitutional question or from the time the court certifies a constitutional challenge, whichever is earlier. Rule 5.1(a) directs that a party promptly serve the notice of constitutional question. The court may extend the 60-period on its own or on motion. One occasion for extension may arise if the court certifies a challenge under § 2403 after a party files a notice of constitutional question. Pretrial activities may continue without interruption during the intervention

period, and the court retains authority to grant interlocutory relief. The court may reject a constitutional challenge to a statute at any time. But the court may not enter a final judgment holding a statute unconstitutional before the attorney general has responded or the intervention period has expired without response. This rule does not displace any of the statutory or rule procedures that permit dismissal of all or part of an action — including a constitutional challenge — at any time, even before service of process.

Rule 24(c)

The provisions of Rule 24(c) that now address the questions covered by new Rule 5.1 should be deleted if Rule 5.1 is approved for adoption:

Rule 24. Intervention

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(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. ~~When the constitutionality of an Act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C.,~~

~~§ 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, officer, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.~~

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Committee Note

New Rule 5.1 replaces the final three sentences of Rule 24(c), implementing the provisions of 28 U.S.C. § 2403. Section 2403 requires notification to the Attorney General of the United States when the constitutionality of an Act of Congress is called in question, and to the state attorney general when the constitutionality of a state statute is drawn in question.

Changes Made After Publication and Comment

Rule 5.1 as proposed for adoption incorporates several changes from the published draft. The changes were made in response to public comments and Advisory Committee discussion.

The Advisory Committee debated at length the question whether the party who files a notice of constitutional question should be required to serve the notice on the appropriate attorney general. The service requirement was retained, but the time for intervention was

set to run from the earlier of the notice filing or the court's certification. The definition of the time to intervene was changed in tandem with this change. The published rule directed the court to set an intervention time not less than 60 days from the court's certification. This was changed to set a 60-day period in the rule "[u]nless the court sets a later time." The Committee Note points out that the court may extend the 60-day period on its own or on motion, and recognizes that an occasion for extension may arise if the 60-day period begins with the filing of the notice of constitutional question.

The method of serving the notice of constitutional question set by the published rule called for serving the United States Attorney General under Civil Rule 4, and for serving a state attorney general by certified or registered mail. This proposal has been changed to provide service in all cases either by certified or registered mail or by sending the Notice to an electronic address designated by the attorney general for this purpose.

The rule proposed for adoption brings into subdivision (c) matters that were stated in the published Committee Note but not in the rule text. The court may reject a constitutional challenge at any time, but may not enter a final judgment holding a statute unconstitutional before the time set to intervene expires.

The published rule would have required notice and certification when an officer of the United States or a state brings suit in an official capacity. There is no need for notice in such circumstances. The words "is sued" were deleted to correct this oversight.

Several style changes were made at the Style Subcommittee's suggestion. One change that straddles the line between substance and style appears in Rule 5.1(d). The published version adopted the language of present Rule 24(c): failure to comply with the Notice or certification requirements does not forfeit a constitutional "right." This expression is changed to "claim or defense" from concern that reference to a "right" may invite confusion of the no-forfeiture provision with the merits of the claim or defense that is not forfeited.

Discussion

The impetus for adopting a new rule to implement the certification requirements of 28 U.S.C. § 2403 has been described in earlier reports. The Attorney General — and several state attorneys general — report that they experience imperfect implementation of the court's duty to certify a constitutional challenge to a statute. Present Rule 24(c) is intended to remind the parties and court of § 2403, but location of this provision in the rule governing intervention means that it is likely to be consulted only when someone is seeking to intervene. Relocation to a position at the beginning of the rules may better draw attention to the statute and its implementation.

Beyond relocation, several changes from present Rule 24(c) may improve the implementation of § 2403. Some of the changes are drawn from the model of Appellate Rule 44. The change most likely to make a difference is the creation of a dual-notice requirement. A party who files a notice of constitutional question must serve the notice on the attorney general, while § 2403 itself continues to require that the court certify the question. The party's service will often occur well before the court even becomes aware of the question. Many states have similar dual-notice requirements, which seem to work well.

Rule 5.1 was published for comment in August 2003, along with conforming changes in Rule 24(c). The public comments and renewed discussion at the April Advisory Committee meeting raised questions that were discussed further at the October 2004 Advisory Committee meeting. Changes were made to reflect the discussion and the rule proposed for adoption was approved by e-mail Committee ballot.

The list of changes from the published draft may seem long, but the Advisory Committee believes that the revised Rule 5.1 can be recommended for adoption without republication. There was a point in the April meeting when republication was recommended because the Committee had decided to eliminate the published requirement that the party filing a Notice of Constitutional Question serve the notice on the attorney general. Restoration of the service requirement eliminates the basis for the recommendation. Most of the remaining

changes clearly do not warrant republication — they involve style improvements, or bring into the text of the rule matters that were included in the published Committee Note. The only new issue that could not have been anticipated in the original comment period is the decision to run intervention time from the earlier of notice filing or certification. That change does not seem to warrant republication, particularly in light of the provision that allows the court to set a later time. Department of Justice representatives have worked closely with the Advisory Committee and are satisfied not only with the recommended rule but also with the notice and intervention-time changes made from the published draft.

Summary of Comments: August 2003 Rule 5.1

03-CV-005, Hon. Geraldine Mund: As to style, it is better to say "A party who" rather than "A party that." This rule should be incorporated in the Bankruptcy Rules "as we receive constitutional challenges to both state and federal statutes and there is no requirement here that notice be given in a bankruptcy case."

03-CV-008, State Bar of California Committee on Federal Courts: (1) Creating a new Rule 5.1 "seems likely to highlight the notice requirement in a way the current rules fail to do." The Committee supports this. (2) Rather than set a minimum 60-day period for intervention, the period should be set in the district court's discretion. Action is likely to be frozen for the 60 days, and that can thwart timely relief. Rule 24 requires timely intervention; that suffices. There is no indication that state or federal governments have suffered for lack of an explicit time period for intervention. The analogy to the 60-day answer period in Rule 12(b)(3)(A) is not persuasive; the statutory challenge may arise later in the litigation, and for that matter some statutes require the government to answer in less than 60 days. (3) Literally, Rule 5.1 may require multiple notices; a party should be required to file only one notice in a single case.

03-CV-005, State Bar of Michigan Committee on Federal Courts: (1) Delete "sued" from both (a)(1) and (a)(2): "and no party is the United States, a United States agency, or an officer or employee of the United States ~~sued~~ in an official capacity." Notice should not be required if an officer or employee of the United States is a plaintiff in

an official capacity. Appellate Rule 44 reads: "in which the United States or its agency, officer, or employee is not a party in an official capacity." (2) There is no reason to require the party to give notice; notice from the court clerk, required by statute, suffices. (3) But if the rule does provide that the party give notice, (a)(2)(B) should specify the method of serving notice on the State Attorney General: "serve * * * the State Attorney General by sending copies by registered or certified mail."

03-CV-010, Bill Lockyer, Attorney General of California: Supports the proposal. "It is this office's experience that the clerk's-notice requirements of current Rule 24(c) often go unsatisfied. As a result, we are frequently ignorant of pending litigation in district court that involves the constitutionality of a state statute. Proposed Rule 5.1 increases the likelihood that an Attorney General will be notified of such litigation * * *." And it is good to reach all statutes, not only those that affect the public interest.

03-CV-011, Peter D. Keisler, Assistant Attorney General, Civil Division, U. S. Department of Justice: Expresses the Department of Justice's "strong support of the final proposal." (1) Despite § 2403 and Civil Rule 24(c), "there have been many instances in which the Attorney General has not been provided with notice of constitutional challenges or has received informal notice at a late stage of a proceeding." Requiring notice by a party in addition to the court certification "will ensure that the Attorney General is made aware of constitutional challenges in a timely manner." The incremental burden on the parties is slight — Rule 24(c) now requires the party to call the court's attention to the duty to certify. (2) The 60-day intervention period recognizes "the Department's internal administrative procedures that must be followed upon receipt of a notice." But the Committee Note should state that Rule 5.1 does not itself restrict the Attorney General's opportunity to intervene more than 60 days after the Rule 5.1(b) certification, and that the rule does not limit the opportunity to intervene after final judgment if a party or the court fails to comply with the duty to give notice or certify. (3) After considering other possible methods of serving the party's notice, the Department has concluded that service in the manner provided by Civil Rule 4(i)(1)(B) "will best ensure timely and proper processing of notices." (4) The differences between Civil Rule 5.1

and Appellate Rule 44 are justified. It is important that the government have an opportunity to be present "as a party in district court, where the factual record is made and constitutional arguments are developed." In addition, notice "under Appellate Rule 44 functions more smoothly given the nature of the appeals process and the centralized circuit court structure." (This comment also expresses approval of several other features of proposed Rule 5.1 that have not drawn adverse comment by other participants.)

03-CV-013, Federal Magistrate Judges Assn., by Hon. Louisa S Porter: Supports Rule 5.1, and specifically mentions (1) moving this out from Rule 24(c); (2) placing the burden of notification on the party that brings constitutionality into question; (3) addressing the "interface with" the § 2403 certification requirement; and (4) establishing a 60-day intervention period.

Ken Salazar, Attorney General of Colorado, October 20, 2004: Under the present rule, "I am not confident that the notices of challenges are sent consistently to my office. By placing the obligation for notice on the party challenging the statute in addition to the court, the new rule will result in a greater likelihood that the attorneys general will receive notification of challenge to the constitutionality of a state statute in a prompt manner." This obligation "will not be new to Colorado practitioners." Colorado state practice imposes a similar obligation. Placing the new requirement in a separate rule is a good idea; present Rule 24(c) "can easily be overlooked." And it is wise to expand the notice requirement by deleting the § 2403 limit that requires certification only if the statute affects the public interest; it is better that the attorney general determine whether to seek intervention on the ground that the public interest is affected.

Patrick C. Lynch, Attorney General of Rhode Island, October 20, 2004: "I write to strongly support the adoption of Proposed Federal Rule of Civil Procedure 5.1." The requirement that a party file a Notice of Constitutional Challenge and serve it on the Attorney General "will ensure that proper and timely notice is given to the State Attorney General of constitutional challenges."

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